No. 89-116

IN THE

Supreme Court of the United States

SPRING TERM 1989

JERRY GRONQUIST, d/b/a GRONK'S DONUT AND SANDWICH SHOP,

Petitioner,

v.

BOULDER URBAN RENEWAL AUTHORITY; DOUGLAS L. HOUSTON, EXECUTIVE DIRECTOR OF BURA; THOM MANN, Individually and as REAL ESTATE AND RELOCATION OFFICER OF BURA,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTION PRESENTED

Whether defendants' refusal to give plaintiff the money to purchase a grease trap ventilation hood, required of his business under Boulder County health regulations, constituted a deprivation of property in violation of the due process clause of the United States Constitution.

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I. STATEMENT OF THE CASE

Plaintiff, Jerry Gronquist, d/b/a Gronk's Donut and Sandwich Shop, petitions for certiorari review of the Colorado Court of Appeals' decision affirming the trial court's entry of summary judgment in favor of defendants.

The critical facts in this case are essentially undisputed. Plaintiff conducted a donut and sandwich shop in the Crossroads Shopping Center in Boulder, Colorado. When defendant Boulder Urban Renewal Authority ("BURA") began redevelopment of this shopping center, businesses therein were dislocated. Plaintiff then sought a new lease at a different location for his business.

In addition to compensating the property owners for the value of the property condemned, BURA was authorized to award certain expenses to businesses for costs associated with relocating. In this regard, BURA promulgated a relocation handbook which set forth specific expenses which would be compensated as costs associated with relocation. These items are contained in Section A of the manual. Costs associated with code upgrading were not a provided relocation expense.

Plaintiff demanded of BURA certain expenses associated with moving to a contemplated new location. BURA offered to pay plaintiff $57,000, which amount covered every item of expense except a grease trap ventilation hood which plaintiff was required to install at the new location in order to meet Boulder health requirements. Since relocation expenses were not a compensable cost associated with moving a business, this item was rejected. Plaintiff refused to accept the $57,000 and did not relocate his business.

On July 8, 1982, plaintiff filed a complaint against defendants. Defendants moved for summary judgment, contending that plaintiff had failed to comply with the notice requirements of §24-10-109, C.R.S. The trial court granted defendants' motion for summary judgment on May 9, 1983. The Colorado Court of Appeals reversed the district court's

entry of summary judgment, holding that plaintiff's complaint, "although hardly a model of clarity," could be read to assert that some of defendants' alleged conduct occurred before the expiration of the time limitation contained in §24-10-109, C.R.S.

After the Court of Appeals' remand, defendants again moved for summary judgment on the basis that plaintiff had no right to relocation benefits other than those provided for in the relocation handbook, and that their conduct was insulated from liability under the doctrine of official immunity. The trial court granted defendants' motion for summary judgment. The Colorado Court of Appeals affirmed. Plaintiff's petition for certiorari to the Colorado Supreme Court was denied. This petition for certiorari follows.

II. REASON FOR NOT GRANTING THE PETITION

A. Defendants' Refusal To Give Plaintiff The Money To Purchase A Grease Trap Ventilation Hood, Required Of His Business Under Boulder County Health Regulations, Did Not Constitute A Deprivation Of Property In Violation Of The Due Process Clause Of The United States Constitution

As a preliminary matter, defendants note that the district court and the court of appeals correctly held that defendants are immune from suit under the doctrine of qualified official immunity. *See Trimble v. City & County of Denver*, 697 P.2d 716 (Colo. 1985); *Troxel v. Town of Basalt*, 682 P.2d 501 (Colo. App. 1984). Thus the constitutional issue raised by plaintiff need not be addressed for this reason alone. Nevertheless, plaintiff's constitutional arguments are completely without merit.

In *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority*, 183 Colo. 441, 517 P.2d 845 (1974) the Colorado Supreme Court held:

> It is well-settled that the goodwill of a business, though not property in and of itself, has value and

> may form the subject matter of a sale. (Citations omitted) Nevertheless, goodwill and profits traditionally have not been regarded as elements of just compensation under either the due process or just compensation clauses of the federal and state constitutions.

517 P.2d at 847. Regarding dislocation or relocation expenses, the court further explained:

> Our attention has not been directed to anything in the federal or state constitutions which mandates compensation for these losses incidental to the dislocation, including goodwill and business profits, and we regard the supplemental payments to be statutory grants. It was for the Legislature in its discretion to declare what, if any, expenses and losses should be reimbursed by supplemental payments.

517 P.2d at 848. *Also see, Mitchell* v. *United States*, 267 U.S. 341 (1925).

It must be stressed that plaintiff has mischaracterized the issue presented in this case. BURA did not condemn plaintiff's property. Plaintiff was a lessee of this property. Plaintiff's real argument is that he suffered a violation of his constitutional rights because BURA did not give him the money to purchase a grease trap hood in order to bring his establishment up to code. BURA permitted plaintiff to continue his business and to relocate. BURA even offered him $57,000 as compensation for relocation expenses. Plaintiff's sole complaint is that he would be required to install a grease trap ventilation hood at a new location selected by him, which expense BURA would not pay. Plaintiff then refused BURA's offer of $57,000 in relocation expenses.

This is not a case in which the plaintiff's business suffers loss of good will or profits as the result of the condemnation of his property. Again, plaintiff's property was not condemned. Petitioner's loss of his "goodwill and business profits" was caused by his decision not to accept the $57,000 in relocation

expenses and attempt to relocate. None of the cases cited by petitioner are implicated in this litigation since they all involve situations in which the plaintiff's property is condemned and loss of good will or profits is an alleged direct result. *See*, e.g., *In Re Ziegler's Petition*, 357 Mich. 20, 97 N.W.2d 748 (1959); *St. Agnes Cemetary* v. *State*, 3 N.Y.2d 37, 163 N.Y.S.2d 655 (1957).

In *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), this Court articulated three factors to be considered in determining whether a regulation causes a compensable taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Here, the economic impact of the BURA regulation on petitioner was entirely indirect: BURA condemned the property on which petitioner was conducting its business, not petitioner's property or business. There is nothing in the record which would indicate "the extent to which the regulation has interfered with distinct investment-backed expectations" of petitioner. The particular expense in question, the grease trap ventilation hood, was certainly not an "investment-backed expectation" for petitioner. Petitioner does not argue that he invested extensively in the lease at the original site in reliance upon an expectation that he would not be required to install a grease trap ventilation hood. And third, the character of the governmental action here is, again, purely indirect: BURA condemned the property on which petitioner was conducting its business, not petitioner's property or its business. Thus, the three factors enunciated in *Penn Central* indicate the correctness of the Court of Appeals' decision herein.

III. CONCLUSION

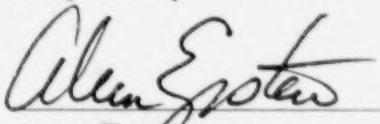
Plaintiff's contention that his constitutional rights were violated because defendants did not give him the money to purchase equipment to bring his property up to code specifications is clearly without merit. The logical extension of

plaintiff's argument would lead to absurd results. Under plaintiff's reasoning, any governmental regulation which has a negative economic impact, no matter now remote, is a "taking" of property without compensation in violation of the due process clause. Hence, plaintiff's obtuse argument that his constitutional rights were violated because, although he did not have to meet certain building code requirements in one location, he would incur certain upgrading expenses at a new location since he was not "grandfathered" there.

Thus, if the City of Boulder had changed its building code to require plaintiff to obtain a grease trap ventilation hood in his old location without a "grandfather" clause, then the City of Boulder would have had to give plaintiff the money to purchase this item because, under plaintiff's reasoning, its refusal to do so would put him out of business in violation of his "constitutional" rights.

This harassing and wholly meritless litigation has been pursued by plaintiff since 1982. Defendants request that this Court terminate this waste of judicial time and resources by denying plaintiff's petition for certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 1989, a true and correct copy of the above and foregoing BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS was deposited in the United States mail, postage prepaid, addressed to:

Jerry Gronquist
1539 Madison Court
Louisville, CO 80027

Alan Epstein

STATE OF COLORADO)
)
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this 17th day of August, 1989 by Alan Epstein. Witness my hand and official seal.

My commission expires My Commission Expires July 22, 1990

Brenda A. Brandfas
Notary Public